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No. 93-764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MIDWEST MARINE CONTRACTOR, INC.,
Petitioner,

v.

JAMES P. RUFOLO and SERVICE WELDING & SHIPBUILDING, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT SERVICE WELDING & SHIPBUILDING, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

Service Welding & Shipbuilding is an Illinois Corporation. The corporation is closely held and has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

TABLE OF CONTENTS

	PAGE
LIST OF PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
THIS COURT COULD AFFIRM THE DECISION OF THE COURT OF APPEALS WITHOUT ADDRESSING THE ISSUE OF WHETHER FEDERAL MARITIME LAW SHOULD BAR CONTRIBUTION CLAIMS AGAINST SETTLING JOINT-TORTFEASORS AND, THEREFORE, THIS COURT SHOULD DENY CERTIORARI .	4
Midwest Marine Waived Any Right It May Have To Have Its Liability Limited To Its Proportional Share Of Fault By Failing To Provide Proper Jury Instructions	4
CONCLUSION	7

TABLE OF AUTHORITIES

Cases	PAGE
Joia v. Jo-Ja Service Corp., 817 F.2d 908 (1st Cir. 1987)	6
Matter of Oil Spill By The Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992)	6

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The Respondent, Service Welding & Shipbuilding, Inc., respectfully prays that this Honorable Court deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed by Petitioner, Midwest Marine Contractor, Inc.

STATEMENT OF THE CASE

Statement Of Facts

James Rufolo (hereinafter "Rufolo") was employed by Midwest Marine Contractor, Inc., (hereinafter "Midwest Marine") aboard the *M/V Shoreline II*. The *M/V Shoreline II* is a self-propelled jack-up barge and is designed to raise itself above the surface of the water by hydraulically lowering its spuds, or legs, to the sea bottom. (T. of 12-6-91, page 62).

In September of 1988, the *M/V Shoreline II* was intentionally capsized. (T. of 12-6-91, page 304). Service Welding & Shipbuilding, Inc., (hereinafter "Service Welding") was engaged to make limited repairs to the vessel's spuds and hydraulic system. (Record Item 17, page 6). Service Welding completed those repairs and the vessel was returned to Midwest Marine. After its return, Midwest Marine hired Modern Fluid Technology to make additional repairs to the hydraulic system. (T. of 12-6-91, page 257).

After these repairs the hydraulic system continued to leak hydraulic fluid. Midwest Marine continued to operate the vessel, with full knowledge of the hydraulic fluid leaks, and with a large foot broken off one of the spuds. (T. of 12-5-91, pages 69-70).

On June 2, 1989, while in a state of disrepair, the vessel was raised out of the water off of the coast of Evanston, Illinois. (T. of 12-5-91, pages 67-70). While Rufolo was raising the vessel an additional two feet above the surface of the water, the starboard hydraulic pipe burst. (T. of 12-5-91, page 74). Twenty-five to thirty gallons of hydraulic fluid allegedly sprayed from the pipe, and covered the deck. (T. of 12-5-91, page 77). Rufolo was injured when he fell down the oil covered stairs leading to the engine room. (T. of 12-5-91, page 81).

Rufolo filed an action against Midwest Marine under the Jones Act and general maritime law. Rufolo also sued Service Welding, alleging it was negligent in the performance of the repairs to the hydraulic system. (Record Item 1). Midwest Marine filed a cross-claim for contribution and indemnity against Service Welding.

Shortly before trial, Rufolo settled with Service Welding for the sum of $1,000. Service Welding filed a motion to dismiss the cross-claim for contribution. (Record Item 83). The trial court found that the settlement between Rufolo and Service Welding was in good faith and dismissed Midwest Marine's Cross-Claim for Contribution. (T. of 11-1-91, pages 11-12).

The District Court held the good faith settlement between Rufolo and Service Welding barred Midwest Marine's contribution claim. The District Court also advised Midwest Marine that its liability could be limited to its proportional share of fault by a proper instruction to the jury. (T. of 11-1-91, page 7).

The case then proceeded to trial against Midwest Marine. At trial, Midwest Marine unsuccessfully attempted to establish that Service Welding was responsible for the repair of the starboard hydraulic pipe. In fact, there was *no competent evidence* introduced to show that Service Welding was responsible for the starboard hydraulic pipe or that it did in fact make repairs to that pipe. (T. of 12-6-91, pages 269-272, and 333).

Midwest Marine implied in its Petition for Writ of Certiorari that the testimony established that Service Welding was responsible for the repairs to the hydraulic pipe that burst. (Petition for Writ of Certiorari, page 4). That is an incorrect statement of the evidence. There was *no competent evidence* at trial to show that Service Welding repaired the pipe in question. Midwest Marine

relies upon a leading *question* asked of Rufolo's expert, Louis Licastro, to prove that Service Welding installed the starboard hydraulic pipe. *Id.* The leading question assumes a matter not in evidence—that Service Welding made its alleged repairs. However, there was *no evidence* Licastro knew if Service Welding repaired that pipe. In fact, *Licastro testified he did not know* if Service Welding repaired that pipe. (T. of 12-6-91, pages 269-272).

Midwest Marine's claim that "Service Welding bore a substantial portion of the fault in negligently repairing the hydraulic jacks aboard the vessel . . ." is essentially unsupported by the record. Midwest Marine failed to establish any fault on the part of Service Welding. (Petition for Writ of Certiorari, page 11).

In addition to failing to support its claim that Service Welding was the cause of Rufolo's injuries, Midwest Marine failed to submit an instruction to the jury that would have permitted the jury to assign fault for Rufolo's injuries to Service Welding. (Record Item 106).

REASON FOR DENYING THE WRIT

THIS COURT COULD AFFIRM THE DECISION OF THE COURT OF APPEALS WITHOUT ADDRESSING THE ISSUE OF WHETHER FEDERAL MARITIME LAW SHOULD BAR CONTRIBUTION CLAIMS AGAINST SETTLING JOINT-TORTFEASORS AND, THEREFORE, THIS COURT SHOULD DENY CERTIORARI.

Midwest Marine Waived Any Right It May Have To Have Its Liability Limited To Its Proportional Share Of Fault By Failing To Provide Proper Jury Instructions.

Rule 15 of the Rules of the Supreme Court of the United States expresses the general principle that this Court should not grant a petition for writ of certiorari in circum-

stances where the Court can rule on the case without addressing the issues presented. This is just such a case.

Midwest Marine is requesting that this Court grant its petition so that the Court can establish a uniform rule in admiralty regarding the right of a non-settling joint-tortfeasor to obtain contribution from a tortfeasor that has settled with the Plaintiff. Midwest Marine has asked this Court to either allow a contribution action against a settling tortfeasor, or adopt the claim-reduction rule. Under either approach, Midwest Marine would have its liability limited to its proportionate share of fault.

Had Midwest Marine submitted a jury instruction in accordance with the directions of the District Court, Midwest Marine could have obtained at trial the precise relief it is now requesting from this Court. Service Welding moved to dismiss Midwest Marine's cross-claim for contribution after Service Welding reached its settlement with Rufolo. The District Court granted the motion and dismissed the contribution claim. The District Court, however, attempted to ensure that Midwest Marine would not be liable beyond its share of fault. In granting Service Welding's motion to dismiss, the Court stated:

> This does not in my judgment, leave you holding the bag either, because at trial you are entitled to have your liability, according to the cases, limited to your proportional fault and I suppose you take care of that by way of instruction to the jury at trial.

(T. of 11-1-91, page 7).

Midwest Marine did not, however, submit an instruction to the jury that would have allowed the jury to assess fault against Service Welding and, assuming such fault was assessed, limit Midwest Marine's liability to its degree of fault. Had such an instruction been submitted Midwest Marine would have obtained its desired relief. Its

failure to do so should be deemed a waiver of its right to so limit its liability. *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987).

The majority opinion of the Seventh Circuit held that Midwest Marine did not waive any objection to its liability. (Petitioner's App. 2). The majority stated that Midwest Marine should not have been required to submit an instruction based upon claim reduction because claim reduction was not the law of the Seventh Circuit under the decision in *Matter of Oil Spill By The Amoco Cadiz*, 954 F.2d 1279, 1318 (1992). *Amoco Cadiz*, however, was not the law of the Seventh Circuit at the time this cause went to trial. The District Court dismissed the contribution claim on November 5, 1991. (Petitioner's App. 25-26). This case proceeded to trial on December 5, 1991 and the jury rendered its verdict on December 11, 1991. (Petitioner's App. 36). *Amoco Cadiz* was not decided until January 24, 1992. *At the time this cause went to trial*, there was no prohibition in the Seventh Circuit against the application of the claim reduction rule in admiralty actions. In fact, the law applicable to this action, at the time it went to trial, was the pronouncement of the District Court that claim reduction would apply. The fact that the Seventh Circuit *later* decided claim reduction was not the law does not cure Midwest Marine's prior waiver.

Senior District Judge Eisele, in his concurring opinion, in this action, pointedly stated that:

> Midwest Marine had waived any objection concerning whether its liability exceeds its proportionate share of fault by failing to submit proper jury instructions.

(Petitioner's App. 11).

Should this Court agree that Midwest Marine has indeed waived its contribution claim by failing to submit

proper jury instructions, this Court then would have no need to decide the issues presented. For that reason, this Court should deny Midwest Marine's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Service Welding & Shipbuilding, Inc., respectfully prays that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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